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No. 408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

MATHIAS WALKER, JR., JOHN E. MOORE, JR., RALPH VAN CURE, a minor by MARGUERITE VAN CURE, his mother and next friend,

Petitioners,

vs.

FOREST PRESERVE DISTRICT OF COOK COUNTY, ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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FOREST PRESERVE DISTRICT OF COOK COUNTY, ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

The Petitioners named above pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois entered in the above consolidated causes on March 25, 1963.

OPINION BELOW.

The opinion of the court below is reported at 27 Ill. 2d 538, and is printed as Appendix A hereof.

JURISDICTION.

The decision of the Supreme Court of Illinois is dated and was entered on March 25, 1963; a petition for rehearing was denied on May 29, 1963. The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1257(3).

QUESTIONS PRESENTED.

1. Can a State Supreme Court constitutionally give certain persons a cause of action against the sovereignty and at the same time deny unto other persons in the exact class this right of action?

2. Whether the Supreme Court of Illinois misinterpreted federal law in failing to hold a retroactive statute giving immunity to municipal corporations unconstitutional.

CONSTITUTIONAL PROVISIONS INVOLVED.

Amendment XIV to the Constitution of the United States, Sec. 1:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE.

Each of the three plaintiffs in these consolidated cases was severely injured and became completely paralyzed as the result of swimming pool accidents. The pools were maintained by the defendant, Forest Preserve District of Cook County. The injuries occurred in 1950, 1957 and 1958, and actions alleging negligence were brought in 1956 and 1959, in the Superior Court of Cook County.

All three complaints were answered, and then dismissed by the trial court on September 27, 1961.

The Supreme Court of Illinois affirmed the order of dismissal in these cases on May 29, 1963.

Prior to May 22, 1959, the common law rule in Illinois was interpreted to be that municipal corporations, such as the defendant District, were immune from tort liability. The Supreme Court of Illinois in *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11 (1959) (cert. denied, 362 U.S. 968), held that the doctrine of sovereign immunity was abolished in Illinois and allowed recovery to Thomas Molitor, the plaintiff in that suit. The date of this opinion was May 21, 1959.

Subsequent thereto, namely, July 22, 1959, the Illinois Legislature enacted Bills restoring immunity for specific municipal corporations. Among these was one which provided that no forest preserve district shall be liable for injuries or for death "of any person heretofore or hereafter resulting from the negligence of the district." (Ch. 57½, Section 3(a), Ill. Revised Statutes.) (Appendix B)

On December 16, 1959, after allowing a rehearing, the Illinois Supreme Court held that the rule of abolishing the doctrine of sovereign immunity should act prospectively only and recovery would be allowed to that particular plaintiff, Thomas Molitor, so as not to deprive him of any benefit for his "effort and expense in challenging the old rule which we now declare erroneous." (18 Ill. 2d 28).

Although other children had been injured in the same accident as Thomas Molitor, the opinion limited recovery to him, and a dissenting opinion correctly prophesies that the decision "will be the source of much confusion and litigation." (18 Ill. 2d p. 43) It is to be noted that Ronald Molitor, another plaintiff in the same action, had intervened in the Supreme Court of Illinois in the case of Thomas Molitor, and his right to recovery was denied at that time.

The actions entitled *Norma Molitor, a minor, Cathy Lee Nelson, a minor, Nancy Meek, a minor, et al.* v. *Kaneland Community Unit Dist. 302*, were thereafter dismissed in the trial court on the basis of the opinion of the Supreme Court to the effect that only Thomas Molitor was entitled to the benefits of the said opinion, *Molitor* v. *Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11 (1959).

The order of dismissal was affirmed by the Appellate Court of Illinois in *Molitor, et al.* v. *Kaneland Community Unit Dist.*, 29 Ill. App. 2d 471, with the Appellate Court saying at p. 476:

> "We believe *Molitor* v. *Kaneland Community Unit Dist. No. 302*, (1959) 18 Ill. 2d 11, 163 N.E. 2d 89, means that, except as to the plaintiff-appellant there concerned, Thomas Molitor, the rule there announced abolishing the immunity from tort liability which was enjoyed by School Districts prior to that case does not have retrospective or retroactive application to cases arising out of occurrences prior to December 16, 1959, the date that the opinion in the *Thomas Molitor* case was filed, and that, except as to him, the rule established in that case applies prospectively only to cases arising out of future occurrences."

Thus, because of the original Molitor opinion by the Supreme Court and because of the only construction which could be followed by the Illinois Appellate Court, the instant cases were dismissed on September 27, 1961, notwithstanding that they had been pending prior to the decision of the original *Molitor* case.

Subsequent thereto, on March 25, 1962, the Illinois Supreme Court, in the case of Norma Molitor, et al., Appellants, wherein multiple parties were plaintiff, reversed itself and held that because the costs of the Thomas Molitor appeal "and the payment of counsel . . . by the Molitor chil-

dren and the other plaintiffs through their parents . . ." made it "now clear that in the trial court the parties envisaged adjudication of the appeal by Thomas Molitor as determining the ruling to be made on the motions to dismiss the complaints of the plaintiffs." (24 Ill. 2d 469)

We are constrained to note that these cases have been tried and judgments recovered.

Thus, the Illinois Supreme Court has allowed a cause of action to certain citizens, and at the same time denied that same remedy to these plaintiffs, whose cases were pending at the time of the original decision in the *Molitor* case because they did not participate in the appeal and share the costs of the appeal. In a word, the Court has given patent rights to a decision to certain citizens.

REASONS FOR GRANTING THE WRIT

1) The denial to these plaintiffs of a remedy granted certain other plaintiffs, whose cases were pending at the same time, is a denial of equal protection of the law.

It is obvious that there is a discrimination between the plaintiffs injured in the *Molitor* case and the instant ones. The basis for that discrimination, namely, to the effect that those in the *Molitor* case had shared part of the costs of

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Thomas Molitor	$ 15,000
Norma Molitor	160,000
Pamela Molitor	155,000
Ronald Molitor	15,000
Cathy Lee Nelson	125,000
Barbara Jo Nelson	210,000
Nancy Meek	125,000
Doris Probst	55,000
Mary Lee Probst	250,000
	$1,050,000

the appeal in the Thomas Molitor decision and had envisioned it as a test case, points up that discrimination.

In the trial court, there was raised a federal question of dismissal. (R. 5, A. 55, 62, 63) Inherent in the very opinions of the Supreme Court is a decision not in accord with the applicable decisions of this Court. There is no precedent for any such discrimination amongst citizens. A Court cannot give to seventeen or eighteen citizens what it simultaneously withholds from other plaintiffs whose cases are pending in different counties at the same time. To do so is offensive to the basic canons of fairness which are characteristic of Anglo-American jurisprudence.

As this Court had occasion to note in a criminal case, *Malinski v. New York*, 324 U.S. 401, 417; 89 L. Ed. 1029, 1039:

> "Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings, in order to ascertain whether they offend these canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial department in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. The fact that judges themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idosyncratic standards are applied. An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under re-

view. But there cannot be blind acceptance even of such weighty judgment without disregarding the historic function of civilized procedure in the progress of liberty".

The decisions of the Illinois Supreme Court have thus given to certain citizens a right of action and denied it to these plaintiffs. In so doing, it has denied them due process and equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States.

A court decision may deprive one of due process of law under the Fourteenth Amendment just as surely as a legislative enactment (*Bachal'er* v. *People*, 319 U.S. 427-429, 87 L. Ed. 1492; *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U.S. 278, 57 L. Ed. 510, 33 Sup. Ct. 218).

As this Court state in *Saunders* v. *Shaw*, 244 U.S. 317, 320, 61 L. Ed. 1163, 1165:

> "But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation."

The questions presented here are unique, vital and of far reaching importance, not only to petitioners but to the entire judicial system of the United States. Moreover, these questions involve other parties with actions pending in the State of Illinois.

2) The "Immunity" statute similarly violates plaintiffs' right to equal protection of the law.

It has been pointed out above that Ch. 27½ Ill. Rev. Stat. (1961) Sec. 3a, establishes the rule of sovereign immunity so far as injuries incurred before its adoption are concerned. This Act was adopted by the Legislature after the first *Molitor* decision. Its effect was therefore to provide that no one except Thomas Molitor could recover under the same factual situation.

3) The "immunity" statute accordingly violates the rights of those plaintiffs, and others in the same position, in exactly the same ways as pointed out above, and the Supreme Court of Illinois erred in failing to so hold.

The "immunity" statute accordingly violates the rights of those plaintiffs, and others in the same position, in exactly the same ways as pointed out above, and the Supreme Court of Illinois erred in failing to so hold.

After May 22, 1959, the date of the first *Molitor* opinion, these plaintiffs had a right that the defense of sovereign immunity should not be interposed to their action against the defendant, Forest Preserve District. In retroactively depriving them of this right in July 22, 1959, the Illinois Legislature deprived them of property without due process of law. If it be said that these plaintiffs had no such right, *then neither did the Molitor plaintiffs.*

The traditional view in Illinois supports our contention that the causes of action which accrued to the appellants are vested rights and therefore property rights under the Constitution. This was first established in *Board of Education v. Blodgett*, 155 Ill. 441; in which the issue was the retroactive application of a law extending the statute of limitations so as to destroy a defense of the defendant to

an action of assumpsit. The court stated that the destruction of the defense which arose after the original statute of limitations ran was a violation of a vested right: "The immunity from suit which arises by operation of the statute of limitations is as valuable a right as the right to bring the suit itself." (153 Ill. at page 449).

In failing to hold that the statute in question is unconstitutional for this reason, the Supreme Court of Illinois decided a federal question in a way not in accord with the probable interpretation of this Court.

CONCLUSION.

The Illinois decisions and statutes challenged by this Petition have the effect of granting to a few citizens, out of all those who are in the same situation, recovery for the negligence of the sovereignty. They violate basic federal concepts of constitutional law, and should be corrected by this Court.

Respectfully submitted.

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APPENDIX A.

(No. 37034.—Judgment affirmed.)

MATHIAS WALKER, JR., *et al.*, Appellants, *vs.* FOREST PRESERVE DISTRICT OF COOK COUNTY, Appellee.

Opinion filed March 25, 1963.—Rehearing denied May 29, 1963.

1. NEGLIGENCE—*when sovereign immunity of forest preserve district is not affected by Molitor decision—statute.* Where plaintiffs each incurred injuries in a swimming pool maintained by a forest preserve district prior to the *Molitor* decision in May, 1959, actions for personal injuries brought in 1956 and June, 1959, were properly dismissed on the ground of sovereign immunity, and it is unnecessary to consider either the applicability or constitutionality of the statute enacted in July, 1959, exempting forest preserve districts from the scope of the original *Molitor* decision. (p. 540)

2. SAME—*maintenance of swimming pool by forest preserve district is a governmental function.* In maintaining a swimming pool, a forest preserve district is engaged in a governmental function rather than a proprietary one, and the fact that the district has collected large sums of money from admission fees does not require that the district be denied sovereign immunity as to such activity. (p. 540)

3. SAME—*when forest preserve district is not liable on nuisance theory for injuries sustained by public.* Where the plaintiffs sustained personal injuries at a swimming pool operated by a forest preserve district, by diving into swallow water, the district is not liable for special damages on a nuisance theory, either at common law or by

virtue of a statute prescribing sanitary requirements for swimming pools, as such nuisance theory is not an exception to the rule of tort liability, for the doctrine of immunity rests on the duty owed by the municipality to the public and the supposition that liability would unduly impair the performance of its functions. (p. 541)

APPEAL from the Superior Court of Cook County; the HON. HAROLD G. WARD, Judge, presiding.

PHILIP E. RYAN, of Chicago, (WILLIAM J. HARTE, of counsel,) for appellants.

J. STIRLING MORTIMER, DONALD N. BERCHEM and LAWRENCE F. MURPHY, all of Chicago, for appellee.

MR. JUSTICE KLINGBIEL delivered the opinion of the court:

Three actions were brought in the superior court of Cook County against the Forest Preserve District of that county, each seeking damages for personal injuries sustained at a swimming pool maintained by the district. Each plaintiff was seriously injured when he dove into shallow water, striking his head on the bottom. In each case it was alleged that the pool was unmarked as to depth and was otherwise dangerously constructed and maintained. Each complaint, in separate counts, sought recovery on a theory of negligence and also on a theory of nuisance.

The first action, brought by Mathias Walker, Jr., in 1956, alleges injuries sustained June 25, 1950. The next plaintiff, John E. Moore, Jr., filed his complaint on June 1, 1959, alleging injuries incurred July 21, 1957. The third suit, brought on behalf of Ralph Van Cure, a minor, was begun on June 1, 1959. It alleged injuries suffered on August 8, 1958. Motions were made to dismiss on the ground of sovereign immunity. The cases were consoli-

dated because of common questions of law, and the complaint in each case was dismissed. Plaintiffs appeal. The appeal comes to this court because the superior court found to be constitutional an immunity statute enacted July 22, 1959. Ill. Rev. Stat. 1961, chap. 57½, par. 3a.

The statute declares that "No forest preserve district shall be liable for any injuries to the person or property or for the death of any person heretofore or hereafter caused by or resulting from the negligence of its agents, servants, officers or employees in the operation or maintenance of any property, equipment or facility under the jurisdiction, control or custody of the district, or otherwise occasioned by the acts or conduct of such officers or employees." The act was passed following our release, on May 22, 1959, of an opinion in *Molitor v. Kaneland Community Unit District*, 18 Ill. 2d 11, whereby the sovereign immunity of municipal corporations in tort actions was abolished. We subsequently granted rehearing in the *Molitor* case, and by final opinion filed December 16, 1959, limited the rule announced therein to a prospective application only. Plaintiffs' first contention in the present cases is that the immunity statute, if construed to apply here, is void because of its retroactive feature. We think it is unnecessary to consider either its applicability or its constitutionality, since even in its absence liability would be precluded by the doctrine of sovereign immunity. (*List v. O'Connor*, 19 Ill. 2d 337.) The legislation was adopted before the scope of the *Molitor* rule was defined on rehearing, and insofar as the act applied to injuries theretofore caused it sought to avoid what would have been the result of the decision on liability of park districts had the holding been left its normal operative effect. In view of the restricted "application" of the decision this feature of the statute is merely declaratory of the law otherwise in force.

It is next argued that the district was a municipal corporation performing a proprietary function, and that as such it was not entitled to sovereign immunity. There is no merit in the contention. In maintaining the swimming pool the district was engaged in a governmental function rather than a proprietary one, and the fact that a fee was charged does not, as urged by the plaintiffs, work a change in its character. *Gebhardt* v. *Village of LaGrange Park*, 354 Ill. 234.

Plaintiffs claim the complaints state a cause of action for nuisance, both at common law and by virtue of a statute prescribing sanitary requirements for swimming pools the violation of which renders them subject to abatement as public nuisances. (Ill. Rev. Stat. 1961, chap. 111½, pars. 88 to 91.) It is then urged that an action for special damages based on nuisance constitutes an exception to the rule of sovereign immunity from tort liability. We cannot accept the argument. The reason for the doctrine of immunity rests on the duty owed by the municipality to the public and the supposition that liability would unduly impair the performance of its functions. (*Molitor* v. *Kaneland Community Unit District*, 18 Ill. 2d 11, 22; *Gebhardt* v. *Village of LaGrange*, 354 Ill. 234.) Plaintiffs have not shown why this reason, if it is valid at all, is not equally so as to liability for damages on a nuisance theory, nor is the reason for limiting the *Molitor* rule to prospective operation any more applicable in the one case than in the other. We see no necessity for further complicating what remains of the doctrine by introducing highly technical distinctions between negligence and nuisance as bases of liability.

As a final contention plaintiffs argue that the Forest Preserve District did not "rely" on precedents of sovereign immunity, within the meaning of the reasons given in the

Molitor opinion for restricting liability to cases arising out of future occurrence. It is further suggested that the district had collected large sums of money from admission fees prior to 1958, that the total has no doubt grown considerably in the ensuing years, that funds must therefore be available to satisfy any judgments that would be rendered, and that a denial of sovereign immunity in these cases "will neither impair the public fund gained through taxes and appropriations, nor impress a burden on the local citizenry." We have considered all of the plaintiffs' arguments but find them to be without sufficient merit to justify further discussion.

The superior court properly dismissed the complaints, and the judgment in favor of defendant is therefore affirmed.

Judgment affirmed.

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FOREST PRESERVE DISTRICT OF COOK COUNTY, ILLINOIS,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners,

vs.

FOREST PRESERVE DISTRICT OF COOK COUNTY, ILLINOIS,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioners seek this Court's review of a judgment of the Supreme Court of Illinois affirming the Superior Court of Cook County's dismissal of plaintiffs' cases on the ground of governmental immunity.

QUESTION PRESENTED.

It is respondent's position that the "Questions Presented" by the petition do not accurately represent the constitutional question, if any, presented to this Court by the decision of the Illinois Supreme Court in affirming dismissal of Petitioners' Complaints under the doctrine of governmental immunity.

It is Respondent's contention that the questions presented are:

1. Is it unconstitutional for the Supreme Court of a State to overrule the common law doctrine of governmental immunity in an action brought against a School District and in a subsequent case against a Forest Preserve District deny a recovery on the ground of sovereign immunity?

2. Can a State Supreme Court constitutionally abolish the common law doctrine of governmental immunity and apply the announced new rule to parties represented in the proceedings leading to the overruling decision and at the same time make prospective its application to all other claimants?

STATEMENT OF THE CASE.

Plaintiffs' statement of the case is correct as far as it relates to the dates of the injuries sustained by the respective plaintiffs and that they occurred at pools maintained by the Forest Preserve District. Thereafter some inaccuracies appear. Respondent states that the material facts are as follows:

1. Separate Complaints were filed by the Petitioners; by Walker in the Superior Court of Cook County on November 7, 1956, amended August 7, 1957, and by Moore and Van Cure in the Circuit Court of Cook County on June 1, 1959.

2. All three Complaints were answered and thereafter the respondent, Forest Preserve District, was given leave to withdraw its Answer in each case and to file identical motions to dismiss each Complaint. Subsequently on motion of all plaintiffs the three cases were consolidated because there was presented a common question of law, i.e., the Forest Preserve District's immunity from tort liability.

3. Upon hearing the trial court dismissed the Complaints on September 27, 1961 (Abst. 63, 64).

4. On March 25, 1963, the Supreme Court of Illinois affirmed the Order of Dismissal and on May 29, 1963 denied rehearing (Petition, Appendix A, 1a).

5. Plaintiffs' constitutional position advanced in the Supreme Court of Illinois was that the trial court had predicated its decision on the statute (Petition, Appendix B, 6a) and referred to by Petitioners in their Petition as the "Immunity" statute (Petition, p. 8), and hereinafter referred to by Respondent by the same designation; that said statute was not applicable to plaintiffs' cases and if applicable, the statute was unconstitutional under both State and Federal Constitutions.

Plaintiffs' claims were predicated upon a theory of a so-called "nuisance exception" to the doctrine of governmental tort immunity and in addition that plaintiffs possessed a vested right to a cause of action against the Forest Preserve District which was allegedly destroyed by the retroactive language of the statute.

6. Plaintiffs admit that at the time of the injuries sustained by them, governmental bodies such as the Forest Preserve District were under the Common Law Rule in Illinois, immune from tort liability (Petition, p. 3).

7. Plaintiffs' position adopted in this court and raised for the first time in this action is that the State Supreme Court's original *Molitor* opinion, *Molitor* v. *Kaneland Community Dist. No. 302*, 18 Ill. 2d 11 (1959) May 22, 1959, abolishing the doctrine of governmental immunity from tort liability created in plaintiff a right which was unaffected by the court's final decision in that case rendered December 16, 1959, upon rehearing and making the overruling of the doctrine of governmental immunity prospective only, except as to the plaintiff in that case and that

the Court subsequently including in that exception the other children injured in the same occurrence while refusing to extend the exception to the plaintiffs, constitutes a violation of due process and equal protection. Plaintiffs further contend that the alleged vested right was infringed by the so-called "Immunity" statute which became effective July 22, 1959, after the first *Molitor* opinion, and before the final *Molitor* opinion rendered on rehearing.

REASONS FOR DENIAL OF THE WRIT

IT IS RESPONDENT'S POSITION THAT THE PETITION SHOULD BE DENIED FOR BOTH JURISDICTIONAL AND SUBSTANTIVE REASONS.

I.

Jurisdictional Grounds.

This Court has repeatedly stated that it will not exercise its jurisdiction to review a final decision of a State Supreme Court unless it affirmatively appears (1) that there was no adequate State ground to support the decision, *Durley* v. *Mayo*, 351 U. S. 277, 281 (1956); (2) that the asserted constitutional question was properly presented, *Terrance* v. *Pennsylvania*, 287 U. S. 660, 53 S. Ct. 222 (1932); (3) that a decision on constitutional questions was necessary for a determination of the case, *Terrance* v. *Pennsylvania*, 287 U. S. 660, 53 S. Ct. 222 (1932). (4) Nor will this Court review such a decision unless the intervention of this Court is necessary in the performance of its constitutional duty, *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549, 569, 67 S. Ct. 1409 (1947).

1. There Are Adequate State Grounds to Support the Decision.

It is clear under this Court's decision in *Great Northern Ry.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, that the Supreme Court of Illinois could have made its decision in the case of *Thomas Molitor* prospective only and have denied thereby to all plaintiffs whose claims arose prior to the effective date of that decision the benefit of the effect of that decision without infringing upon any federal con-

stitutional rights. There is also ample precedent for prospective overruling with the new rule applied to the case in which decision is made. *Bowling* v. *Overholsey*, 100 U. S. App. D. C. 247, 243 F. 2d 825; *Shoultakon* v. *District of Columbia*, 98 U. S. App. D. C. 371, 236 F. 2d 666, 60 A.L.R. 2d 686; *Durham* v. *United States*, 94 U. S. App. D. C. 228, 214 F. 2d 826, 45 A. L. R. 2d 1430.

When it came to the Supreme Court's attention that the appeal prosecuted on behalf of *Thomas Molitor* had been regarded by the court below as well as the parties to all actions arising out of that particular occurrence as representative of the rights of all the parties the Court included them within its application of the rule abolishing governmental immunity.

> "To expedite review and minimize expense, the trial court suggested 'going up on a short record at an early date, on the sole question of whether the Complaint states a good cause of action,' and that this would provide 'the basis for determining the future course of the parties to this case as well as other claimants.' The count on behalf of *Thomas Molitor*, whose name was selected arbitrarily for the appeal, was dismissed." *Norma Molitor, et al.* v. *Kankakee Community Dist. No. 302*, 24 Ill. 2d 467, 468 (March, 1962).

This action on the part of the Supreme Court of Illinois was reasonable in the light of the foregoing authorities and therefore was justified on State grounds.

2. The Alleged Constitutional Violation Based on Molitor Decision Was Not Presented in the State Court.

That portion of plaintiffs' Petition predicated upon the Illinois Supreme Court's treatment of the *Molitor* problem as affecting plaintiffs' constitutional rights was not presented to that Court in either Petitioners' Brief, Oral Argument or Petition for Rehearing though both *Molitor*

decisions had been rendered one year previous. It was consequently not presented to the Supreme Court of Illinois for determination, Ill. Sup. Ct. Rules, Smith Hurd, 1961, Ill. Rev. Stat. Ch. 110 Sec. 101.39, 101.44, and therefore should not be entertained by this court.

3 A Ruling on the Constitutional Question Raised in Reference to the "Immunity" Statute Was Not Necessary for a Determination of the Case.

The application of the "Immunity" Statute to Petitioners' cases was not necessary to a determination of the Petitioners' claims since their claims would be precluded by the common law doctrine of sovereign immunity. Petitioners are not in the exact class of the children injured in the Molitor school bus. Their claims were against the School District for alleged negligence in the operation of a School District bus and those opinions apply to the liability of a School District. Petitioners' claims are against a Forest Preserve District, a governmental corporation, performing entirely different governmental functions. There is no case in the State of Illinois in which the doctrine of governmental immunity in tort liability has been denied or overruled in respect to a Forest Preserve District. By virtue of language of the Supreme Court of Illinois, in *Peters v. Bellinger*, 19 Ill. 2d 365, the Supreme Court might consistently hold that the rule of immunity respecting Forest Preserve District liability was unaffected by the *Molitor* decision. In *Peters v. Bellinger, supra*, the Court said:

> "Those municipal and quasi-municipal corporations which have enjoyed immunity in the past continue to enjoy it until December 16, 1959. Recovery may be made in causes of action arising thereafter *where it is determined that the type of governmental immunity involved is no longer entitled* to immunity. It would be impractical to fix one effective date for abolition

of governmental immunity for schools and different dates for other municipal or quasi-municipal corporations *which may be found no longer entitled* to defend on the ground of immunity." (Emphasis added.)

4. Petitioner Has Not Shown That the Intervention of This Court Is Necessary to the Fulfillment of Its Constitutional Duty.

Petitioners have shown no instance under Illinois law wherein parties in the same or similar circumstances as they have received a different treatment than has been accorded to them. On the contrary, in all cases which have arisen, the Illinois Supreme Court has consistently ruled that no cause of action existed with respect to alleged claims against governmental bodies where said alleged injuries occurred prior to the date of December 16, 1959. *List* v. *O'Connor*, 19 Ill. 2d 337 (1960); *Peters* v. *Bellwood*, 19 Ill. 2d 367 (1960).

II.

THE SUBSTANCE OF PLAINTIFFS' PETITION IS WITHOUT MERIT.

The Petition is premised upon two erroneous assumptions.

First, that the decision of the Illinois Supreme Court in the *Molitor* cases created a remedy in the Petitioners and that the present decision unconstitutionally deprived them of that remedy thereby denying them due process and equal protection of the law.

There is no doubt the Supreme Court of Illinois could have made wholly prospective its decision in the *Molitor* cases and have denied recovery to the children there involved. *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932).

The Court elected to apply its new rule to *Thomas Molitor*

to avoid the objections of dictum and lack of incentive for challenging precedent. It also applied the new rule to the other children involved in the same school bus mishap when it discovered that the *Thomas Molitor* case was representative of all their claims. It made its decision prospective respecting all other claimants to avoid hardship which might result to governmental bodies from their reliance on precedent in failing to investigate injuries occasioned in the carrying out of their governmental functions and the consequent inability to properly protect their legitimate interests. In the *Molitor* cases the Illinois Supreme Court sought to overturn the doctrine of governmental immunity and to do so with as little dislocation of legal rights and defenses as possible to all parties affected thereby.

It is conceivable that in allowing recovery to the *Molitor* plaintiffs the Illinois Supreme Court might have been in error and that in consequence thereof the *Molitor* plaintiffs benefited thereby. It does not, however, follow that the Petitioners can predicate a right upon such possible error and seek the aid of this Court in imposing upon the State of Illinois a rule of law inconsistent with its right to determine its own organic law and thereby foreclose to the State the opportunity to correct such error.

As pointed out by Chief Justice Vinson of this Court in his address before the American Bar Association, September 7, 1949, it has never been the concern of this Court to correct the errors of lower courts. "To remain effective the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved . . ."

Were this Court to grant the Writ here sought it could only be to consider the validity of the action of Illinois Supreme Court in allowing its prospective overruling of

the doctrine of governmental immunity to be applied to the parties whose claims were the subject of the litigation in which the doctrine was overruled. The validity of that action is not a proper subject of this Petition.

Second: petitioners' other erroneous assumption is that they had a vested right to a cause of action against the Forest Preserve District of which they were unconstitutionally deprived by the retroactive language of the Statute.

Petitioners admit (Petition, p. 3) that the doctrine of governmental immunity was the law of Illinois at the time of the alleged injuries sustained by them. It is clear under Illinois law, *List v. O'Connor*, 19 Ill. 2d 337 (1960), that no cause of action existed at the time of the alleged injuries. If a cause of action existed it could only arise by statute or by decision, *Roumbos v. City of Chicago*, 332 Ill. 70, 78 (1928). There is no statute creating a cause of action for tort, nor are there any cases creating such a cause of action against Forest Preserve Districts and since the so-called "Immunity" Statute was passed prior to the effective date of the *Molitor* decision overruling the pre-existing rule of immunity as to School Districts, the statute clearly does not present any constitutional question for this Court's consideration.

CONCLUSION.

It is respectfully submitted that for the foregoing
sons this case is not a proper one for review by certio
in this Court, and that the Petition for a writ of certi
should be denied.

Respectfully submitted.

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No. 408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

MATHIAS WALKER, JR., JOHN E. MOORE, JR., RALPH VAN CURE, a Minor By MARGUERITE VAN CURE, His Mother and Next Friend,

Petitioners,

vs.

FOREST PRESERVE DISTRICT OF COOK COUNTY, ILLINOIS,

Respondent

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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The Schaffer Press, Inc.—ANdover 3-6850

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vs.

FOREST PRESERVE DISTRICT OF COOK COUNTY, ILLINOIS,

Respondent.

PETITIONERS' PETITION FOR REHEARING

Petitioners, on the grounds following, petition for rehearing of this Court's denial of Petition for Writ of Certiorari to the Supreme Court of Illinois.

I. PETITIONERS HAVE SUBSTANTIAL GROUNDS AVAILABLE TO PETITIONERS NOT PREVIOUSLY PRESENTED.

The onset and course of petitioners' causes of action through the labyrinth of the civil procedural system in Cook County and the State of Illinois for right to an early trial, in effect in the jurisdiction at the time these causes of action were winding their way to an ultimate decision, must be considered in the light of the record herein. The injuries occurred in 1950, 1957 and 1958, and actions alleg-

ing negligence were brought in 1956 and 1959 in the Superior Court of Cook County. The controlling *Molitor* decision action occurred on March 10, 1958, and occurred in another county and was appealed from the Circuit Court of that County.

The Trial Court held up the Petition for Advancement of the *Walker* cause of action awaiting the decision of the Supreme Court in the *Molitor* case. Verification of this statement can be found in respondent's Brief in the Illinois Supreme Court, on page 14, and set forth below:

> "During the many pre-trial conferences conducted after plaintiff's motion of June 17, 1958 for the purpose of determining the issue of advancement of this case for trial, both plaintiff and defendant and Judge Harold Ward became aware of the case of *Molitor* v. *Kaneland Community District No. 302* then pending in the Appellate Court and subsequently in this court and that the defendant, The Forest Preserve District participated as *amicus curiae* in a petition for a rehearing in that case in this court. Judge Harold Ward withheld his decision on advancement and continued plaintiff's petition from time to time pending the final decision in *Molitor*. This final decision was rendered in *Molitor* on December 19, 1959 and it was followed by a petition for leave to intervene and for a clarification of the opinion in this court, which was thereafter denied. Certiorari was then taken to the United States Supreme Court and also denied."

The final decision in the Second Molitor case in the *Molitor* v. *Kaneland Community District No. 302*, was rendered May 23, 1962; nevertheless plaintiffs' causes of action were dismissed in the Trial Court on September 27, 1961, and petitioners were denied the benefit of the intent of the language of the Illinois Supreme Court, where it is set forth:

> "We are dealing here only with claims which, as clearly appears from the record now before us the parties contemplated would be adjudicated in accordance with disposition of the claim of Thomas Molitor." (*Molitor* v. *Kaneland Unit No. 302*, 24 Ill. 2d 467.)

Thus, because these petitioners relied on a test case, where the respondent filed *amicus curiae* briefs, they were dismissed before final decision by the Trial Court on the basis of the first opinion and then denied relief by the State Supreme Court who, by its final decision, give a certain class of citizens relief who had instituted an appeal and denied the same to petitioners. This is not equal protection of the law under the constitution.

Apparently, this Court adopts the argument of the respondent that petitioners are not in the same class as the School District cases. This argument is misleading and belies the record. Respondent as amicus curiae in the *Molitor* case was an advocate and argued otherwise.*

Until the petitioners had exhausted their remedies in the backlog of the State Courts, being denied due process and equal protection of law while they pursued their causes of action and held in statis quo while amicus curiae briefs were filed, other citizens were granted an expeditious hearing on the question involved.

It is respondent's position in its Reply Brief to the original Petition herein, that the Illinois Supreme Court had a right to include other litigants in their final decision by its statement on page 6, as follows:

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* S. Krislov, Amicus Curiae Brief: from friendship to advocacy, 72 Yale Law Journal, p. 694 [March '63].

"When it came to the Supreme Court's attention that the appeal prosecuted on behalf of *Thomas Molitor* had been regarded by the court below as well as the parties to all actions arising out of that particular occurrence as representative of the rights of all the parties the Court included them within its application of the rule abolishing governmental immunity.

> 'To expedite review and minimize expense, the trial court suggested 'going up on a short record at an early date on the sole question of whether the Complaint states a good cause of action.' and that this would provide 'the basis for determining the future course of the parties to this case as well as other Claimants.' The count on behalf of *Thomas Molitor*, whose name was selected arbitrarily for the appeal, was dismissed.' *Norma Molitor, et al* v. *Kaneland Community Dist. No. 302*, 24 Ill. 2d 467, 468 (March, 1962).

"This action on the part of the Supreme Court of Illinois was reasonable in the light of the foregoing authorities and therefore was justified on State grounds."

The sole question to decide now is whether due process or equal protection has been violated. The injuries sustained by the petitioners depleted them of all financial status and while they were held in status quo on the prosecution of their lawsuit and relying on the abolition of the governmental immunity doctrine to include them, the Illinois Supreme Court denied these petitioners relief, rewarding those who tested the law by appeal.

As the court said in *Griffin* v. *Illinois*, 351 U.S. 12, page 18:

> "* * * Indeed, a provision in the Constitution of Illinois of 1818 provided that every person in Illinois 'ought to obtain right and justice freely, and without

being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.'

"There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance."

Petitioners raised the constitutional violations of the right to a prompt trial, due process, and violation of equal protection from the outset and the probability that denial of petitioners' constitutional rights is so great that this court should grant certiorari on that issue as is.

Respectfully submitted,

MARY M. SHAW,
Attorney for Petitioners.

PHILIP E. RYAN,
of Counsel.

CERTIFICATE

The foregoing petition for rehearing is believed to be meritorious and is presented in good faith and not for delay and is restricted to the grounds above specified.

.....

MARY M. SHAW,
Attorney for Petitioners.

PHILIP E. RYAN,
of Counsel.